STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNANDO DUVAL DUQUESNAY,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 233766
Wayne Circuit Court
LC No. 99-009310

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, after a bench trial, of possession with intent to deliver more than 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant to 160 to 240 months' imprisonment. We affirm defendant's conviction, but remand for resentencing.

This case arises from a routine traffic stop in the late afternoon of August 30, 1999. Two police officers in a fully marked state police patrol vehicle stopped the vehicle that defendant was driving, intending to cite defendant for disregarding a traffic control device. The officers approached on either side of the vehicle. Defendant produced a New York driver's license and the car rental papers, which indicated that the car was rented to someone other than defendant, but listed defendant as an additional driver. One of the officers testified that defendant's actions during his conversation with defendant aroused the officer's suspicions. According to that officer, defendant repeatedly looked down at his feet, was sitting with his feet together and close to the seat, and kept his feet together even while reaching for the car rental papers from the glove compartment, which led the officer to believe that crime was afoot and caused him concern for his safety.

The officer testified that he asked defendant if they could search the vehicle, and defendant responded "go ahead" and exited the vehicle voluntarily. Contrary to the officer's testimony, defendant testified that he did not to consent a search, but that after he revealed that he was from Jamaica, the officer opened the car door and instructed him to exit the vehicle. The officer testified that as defendant exited the vehicle, defendant looked down at the seat and reached his hands down between his legs, pushing underneath the seat. The officer escorted defendant to the rear of the vehicle and searched for weapons. The officer's partner searched the driver's compartment of the vehicle and immediately discovered under the driver's seat a brick of a substance that she believed to be cocaine. The officers arrested defendant. Later, forensic

testing revealed that the brick, which was wrapped in plastic and inside a gray plastic bag, did in fact contain cocaine and weighed 997 grams.

The prosecution charged defendant with possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i). Defendant moved for suppression of the cocaine on the basis of an illegal search, but the trial court denied the motion, indicating that the circumstances provided probable cause to support the non-consensual warrantless search of the vehicle. A bench trial proceeded, during which the trial court suppressed defendant's statement to the police. The trial court convicted defendant of possession with intent to deliver more than 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and sentenced him to 160 to 240 months' imprisonment. This appeal ensued.

Defendant first argues on appeal that the trial court clearly erred in denying his motion to suppress the cocaine. Specifically, defendant argues that the trial court erred in concluding that defendant's "furtive gestures" provided probable cause for the search of the vehicle. We review a trial court's factual findings on a motion to suppress evidence for clear error. *People v McKinney*, 251 Mich App 205, 207; 650 NW2d 353 (2002); MCR 2.613(C). A trial court's ultimate decision on a motion to suppress evidence is reviewed de novo. *McKinney*, *supra*.

We agree with defendant that the trial court erred in concluding that defendant's "furtive gestures" provided probable cause for the search of the vehicle.[1] *People v Young*, 89 Mich App 753, 761; 282 NW2d 211 (1979); *People v Pitts*, 40 Mich App 567, 576; 199 NW2d 271 (1972). However, our analysis does not end here. A police officer may conduct a pat-down search of a detained person for weapons if the officer has a reasonable suspicion that the individual is armed. *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). In *Terry*, the United States Supreme Court explained that

> there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. [*Id.* (citations omitted).]

The *Terry* search has been extended from the search of individuals for weapons to the search of the passenger compartment of vehicles. *Michigan v Long*, 463 US 1032, 1049-1050; 103 S Ct

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[1] The prosecution concedes on appeal that "[a]lthough [the officer] had a suspicion that defendant may have been trying to conceal a crime, he had no probable cause at that time that defendant was involved in criminal activity."

3469; 77 L Ed 2d 1201 (1983); *People v Gewarges*, 176 Mich App 65, 69-73; 439 NW2d 272 (1989). In *Long, supra*, the United States Supreme Court explained:

> Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." If a suspect is "dangerous," he is no less dangerous simply because he is not arrested. If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances. [*Id.* at 1049-1050 (citations omitted).]

Our Supreme Court has explained that "[r]easonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Custer, supra*, quoting *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996).

Here, the officer testified that defendant was driving a rental car and had an out-of-state license. The officer further testified that defendant's furtive gestures and unusual behavior made him concerned for his safety and that defendant's foot placement, body language, eye contact, and demeanor were unusual in his experience as a police officer. Furtive behavior and a police officer's experience are properly considered factors for establishing reasonable suspicion. See *Champion, supra* at 99; *People v Yeoman*, 218 Mich App 406, 411; 554 NW2d 577 (1996). Under the totality of the circumstances, the protective search of defendant's vehicle was valid under the Fourth Amendment of the United States Constitution and Const 1963, art 1, § 11. *Custer, supra* at 328-330; *Champion, supra* at 98-99.

Moreover, we agree with the prosecutor that even if the search during which the cocaine was discovered were improper, which it was not, the cocaine would still be admissible on the basis of inevitable discovery. Under the inevitable discovery rule, "evidence obtained in violation of the constitution could still be admitted at trial if the prosecution established by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *People v Brzezinski*, 243 Mich App 431, 435; 622 NW2d 528 (2000). Here, the record reveals that during the traffic stop the officer asked for defendant's driver's license. Although the officers found the cocaine and arrested defendant before checking the status of defendant's license, the officer's testimony indicated that it is his practice to check the status of the driver's license before ending a traffic stop. When he arrived at the police post, the officer ran defendant's New York license and found that it was suspended. Accordingly,

defendant would have been arrested had the traffic stop proceeded to the point of checking the status of defendant's license. Once the occupant of a vehicle is lawfully arrested, both the occupant and the passenger compartment of the vehicle may be searched. *Yeoman, supra* at 412. Because the cocaine would have been discovered inevitably, the evidence was properly admitted at trial.

Defendant next argues that he is entitled to resentencing because the trial court imposed a sentence that exceeded the newly enacted legislative guidelines and exceeded the mandatory minimum imposed by statute, thereby making his sentence disproportionate under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant claims that the trial court erred in failing to state any substantial and compelling reasons for the upward departure from the statutory guidelines sentence of 12 to 20 months' imprisonment, and in exceeding the ten year minimum sentence and imposing the maximum minimum sentence allowable for a first-time offender, without providing any substantial and compelling reasons. We agree that defendant is entitled to resentencing. Because this issue concerns the proper application of the statutory sentencing provisions, our review is de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

With regard to construing statutes in general, this Court recently reiterated the well-established principles:

> In [construing statutes], our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent. [*People v Libbett*, 251 Mich App 353, 365-366; 650 NW2d 407 (2002), quoting *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999) (citations omitted).]

The legislative sentencing guidelines are applicable to controlled substance offenses. MCL 777.13; *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001). The legislative sentencing guidelines, MCL 777.1 *et seq*., MCL 777.13, and the controlled substances act, MCL 333.7101 *et seq*., address sentences for defendants convicted of drug offenses. *Izarraras-Placante, supra*. In *Izarraras-Placante, supra* at 498, this Court explained the principles applicable when analyzing statutes relating to the same subject or sharing a common purpose:

> Statutes that relate to the same subject or share a common purpose are "in pari materia" (literally, "upon the same matter or subject"). Such statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates. When construing statutes that are in pari materia, our goal is to further legislative intent by finding an harmonious construction of the related statutes, so that the statutes work together compatibly to realize that legislative purpose. Accordingly, if two statutes lend themselves to a construction that avoids conflict, then that construction should control. "When construing a

> statute, the court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory." [Internal citations omitted.]

In the present case, there is no dispute that the legislative sentencing guidelines apply in this case where the incident occurred after January 1, 1999. MCR 6.425(D)(1); MCL 769.34(1) and (2), *People v Babcock* (*Babcock I*), 244 Mich App 64, 72; 624 NW2d 479 (2000), after rem (*Babcock II*), 250 Mich App 463; 648 NW2d 221 (2002). Further, defendant is correct that a court must state on the record a substantial and compelling reason when it departs from the legislative sentencing guidelines range. MCL 769.34(3), *Hegwood, supra* at 439. Here, the trial court sentenced defendant pursuant to MCL 333.7401(2)(a)(iii), which provides that a mandatory minimum sentence of ten years' imprisonment must be imposed for the crime for which defendant was convicted, i.e., possession with intent to deliver more than 50 grams but less than 225 grams of cocaine. MCL 769.34(2)(a) expressly deals with such a situation and indicates that when sentencing a defendant, the trial court must impose a sentence that comports with any applicable minimum sentence, and such a mandatory minimum sentence is not a departure from the legislative sentencing guidelines. MCL 769.34(2)(a). Further, a downward departure from a statutory mandatory minimum sentence that exceeds the recommended sentencing guidelines range is not a departure under MCL 769.34. MCL 769.34(2)(a). Thus, had the trial court here imposed a ten-year or less minimum sentence, no explanation for that departure from the legislative sentencing guidelines would have been required. However, the trial court here exceeded the statutory mandatory minimum sentence. Under these circumstances, the question becomes whether the trial court erred in sentencing defendant to a term of imprisonment greater than the ten-year statutory minimum.

Here, as defendant points out, the trial court failed to provide on the record any substantial and compelling reasons for the upward departure from the statutory mandatory minimum sentence. Although the legislative sentencing guidelines provide that the imposition of a mandatory minimum sentence is not a departure, nor is the imposition of a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence, no provision provides that an upward departure from the mandatory minimum is not a departure under the sentencing guidelines. In other words, the trial court's imposition of a sentence greater than the ten-year mandatory minimum is not specifically excluded, and thus the trial court was required to provide a substantial and compelling reason for its upward departure from the statutory minimum sentence.[2] That is, under these circumstances, the trial court's sentencing is controlled by MCL 769.34(3), which provides that if a court departs from the appropriate sentencing guideline's range, it must have "a substantial and compelling reason for that departure and [state] on the record the reasons for departure."[3] Thus, considering the legislative sentencing guidelines in tandem with the controlled substances act, we conclude that the trial court erred in

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[2] In *People v Fields*, 448 Mich 58; 528 NW2d 176 (1995), our Supreme Court interpreted at length this substantial and compelling standard with respect to the controlled substances act, and in *Babcock I, supra* at 74-75, this Court determined that the same interpretation is appropriate under the legislative sentencing guidelines.

[3] It follows that MCL 769.34(7), regarding the court's advice of defendant's rights concerning appeal, is also implicated.

failing to articulate any substantial and compelling reason for its upward departure from both the statutory mandatory minimum sentence and the sentencing guidelines range.[4] Accordingly, remand is necessary for resentencing, allowing the trial court to impose on defendant the mandatory minimum sentence or to articulate substantial and compelling reasons for its departure.

Because remand for resentencing is necessary, it is premature to address defendant's proportionality argument. *Hegwood, supra* at 437, n10; *Babcock II, supra* at 468-469 ("*Hegwood* indicates that the principle of proportionality can be considered concerning the extent of a departure."). Further, because the reason for resentencing here does not involve the trial court's prejudices or improper attitudes regarding defendant, resentencing before a different judge is not necessary. *Hegwood, supra* at 440, n 17; *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Finally, in a pro se supplemental appellate brief, defendant argues that for a number of reasons he was denied effective assistance of appellate counsel. We have considered defendant's claims and conclude that defendant has failed to overcome the presumption that appellate counsel's decision regarding which claims to pursue may be considered sound appellate strategy, *People v Reed*, 198 Mich App 639, 647; 499 NW2d 441 (1993), aff'd 449 Mich 375 (1995); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994), and that it is not apparent from the record that appellate counsel's alleged actions or inaction was error of such magnitude that it rendered appellate counsel's performance seriously deficient, *Hurst, supra* at 642; see *Reed, supra*.

Defendant's conviction is affirmed, but the case is remanded for further action consistent with this opinion.[5] We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

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[4] We note that the sentence imposed here is within the two-thirds rule, i.e., it does not exceed two-thirds of the statutory maximum sentence, MCL 769.34(2)(b), *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972).

[5] We note that the judgment of sentence properly cites the statutory subsection under which defendant was convicted, but inaccurately describes the crime. The date of conviction is also incorrect. On remand for resentencing, those clerical errors should be rectified.